

**Letter of Findings: 09-0608**  
**Sales Tax**  
**For the Years 2006, 2007, 2008**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Sales Tax – Imposition.**

**Authority:** IC § 6-8.1-5-1 (b); IC § 6-2.5-2-1; IC § 6-2.5-4-1; [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 2 (December 2006); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax on some items.

**II. Tax Administration – Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the assessment of penalty.

**STATEMENT OF FACTS**

Taxpayer is in the business of selling used automobiles to retail customers and to wholesale dealers. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer. The audit assessed Taxpayer use tax on some items. The audit also assessed additional sales tax on optional warranties and maintenance agreements on which Taxpayer had not collected sales tax from its customers. Taxpayer did not protest the use tax assessments, but did protest the sales tax assessments and the associated negligence penalties. A hearing was held on the protest and this Letter of Findings results. Additional facts will be provided as necessary.

**I. Sales Tax – Imposition.**

**DISCUSSION**

The Department assessed Taxpayer use tax on the sale of optional warranties it sold as part of its retail sales of some of its vehicles because Taxpayer did not collect and remit sales tax on optional warranties it sold.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b),(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1 imposes sales tax on retail transactions made in Indiana:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

[IC 6-2.5-4-1](#) defines selling at retail:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.

- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:

- (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.
- (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

- (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
  - (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

- (f) Notwithstanding subsection (e):

- (1) in the case of retail sales of gasoline (as defined in [IC 6-6.1.1-103](#)) and special fuel (as defined in [IC 6-6-2.5-22](#)), the gross retail income received from selling at retail is the total sales price of the gasoline or

special fuel minus the part of that price attributable to tax imposed under [IC 6-6-1.1](#), [IC 6-6-2.5](#), or Section 4041(a) or Section 4081 of the Internal Revenue Code; and

(2) in the case of retail sales of cigarettes (as defined in [IC 6-7-1-2](#)), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under [IC 6-7-1](#).

(g) Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

[45 IAC 2.2-4-2](#) elaborates:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

Sales Tax Information Bulletin 2 (December 2006, replacing the bulletin dated May 2002) explains the application of the sales and use tax to tangible personal property transferred pursuant to (1) original warranties or dealer warranties, or (2) optional warranties and maintenance agreements. Typically, in the case of original or dealer warranties that are not an optional when the product is sold are considered already combined in the price of the product and therefore already taxed in the retail sale – assuming the taxpayer paid sales tax on the purchase of the product. In the case of optional warranties, they are taxable if there is a "reasonable expectation" that tangible personal property will be provided.

In this case, Taxpayer does not now dispute that it should have collected sales tax on the optional warranties it sold its customers. However, Taxpayer argues that at the time of these transactions it did not know that the optional warranties were subject to tax separately from the retail sale of the cars. Taxpayer argues that it had not been informed of the obligation to collect tax by its warranty vendors, nor was it informed by the Department of the change. Taxpayer states that in the past it received direct mailings from the Department concerning tax changes. Taxpayer argues that it cannot now contact each customer and request sales tax due on those sales, assuming it can even find these customers, because it would harm its customer relations. Taxpayer states that it is in a highly competitive business and that these are particularly difficult times. Taxpayer points to its history of compliance and requests waiver of the tax.

Taxpayer has an obligation to be current with sales and use tax laws and any other laws that could impact its business. The Department's website is a convenient place for retailers and their advisors to keep abreast of any changes in the law. It would be administratively unreasonable for the Department to inform every business of every change of law that might impact it.

IC § 6-2.5-9-3 states in relevant part:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

It is the duty of every taxpayer to keep abreast of the changes in the law, especially if one is a retail merchant and expected to collect sales tax. Based on the above, Taxpayer had an obligation to collect sales tax on its sale of optional warranties, and having not collected the tax, Taxpayer is, nonetheless, liable for the uncollected tax.

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**FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration–Negligence Penalty.****DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty.

The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

By the terms of [45 IAC 15-11-2\(b\)](#), ignorance of the law is considered de facto negligence, and is, therefore subject to penalty under IC § 6-8.1-10-2.1(a). However, given Taxpayer's otherwise generally good history of compliance, the negligence penalty is waived on a one-time basis. Taxpayer is, however, on notice, that going forward ignorance of the law is not an excuse to waive the negligence penalty.

**FINDING**

Taxpayer's protest of the negligence penalty is sustained.

**CONCLUSION**

Taxpayer's protest of the assessment of use tax is denied. Taxpayer's protest of the negligence penalty is sustained.

*Posted: 01/27/2010 by Legislative Services Agency*

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